

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP LOCKETT,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2004

No. 247845

Wayne Circuit Court

LC No. 02-013131

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of three counts of criminal sexual conduct in the first degree (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(a), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant alleged that she and defendant engaged in sexual intercourse several times during the summer of 2002 when she was twelve years old. Defendant denied complainant's allegations, and maintained that a police officer's testimony that he confessed to such behavior was untrue. The trial court found defendant guilty as charged. Subsequently, the trial court denied defendant's motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), concluding that trial counsel's decisions constituted legitimate trial strategy.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced

the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Whether a person has been deprived of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant argues that trial counsel rendered ineffective assistance by failing to investigate allegations that the complainant contracted a sexually transmitted disease in the summer of 2002 and falsely accused him of engaging in sexual intercourse with her in 2001, and by refusing to allow him to take a polygraph test. We affirm defendant’s convictions.

Defendant is not entitled to a new trial on the basis of ineffective assistance of counsel, nor is defendant entitled to remand for a *Ginther* hearing. Defendant has failed completely to support, by way of affidavit or some form of documentary evidence, the allegations regarding a sexually transmitted disease and false accusations of sexual intercourse. We are left with an argument containing nothing but bold assertions. Additionally, defendant has not substantiated, nor does he even assert, that counsel was aware, at the time of trial, of the claim concerning false accusations of sexual intercourse, or that defendant even informed counsel of the incident, which could have easily been communicated. Accordingly, defendant has failed to show that counsel’s performance was deficient and has failed to overcome the strong presumption that counsel’s performance constituted sound trial strategy.

Moreover, assuming deficient performance, defendant has failed to show that, but for errors by counsel, it is reasonably probable that the results of the proceeding would have been different. There was not only testimony by the complainant regarding episodes of sexual intercourse, which itself is sufficient to support a conviction, MCL 750.520h, there was also evidence that defendant confessed to engaging in sexual intercourse with the complainant. As such, defendant has failed to establish prejudice.<sup>1</sup>

Affirmed.

/s/ William B. Murphy  
/s/ Helene N. White  
/s/ Kirsten Frank Kelly

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<sup>1</sup> With respect to a polygraph examination, while MCL 776.21 requires authorities to give a defendant a polygraph exam on request in CSC cases, the results of any test taken by defendant would have been inadmissible at trial. *People v Barbara*, 400 Mich 352, 411; 255 NW2d 171 (1977). Further, whether defendant would have passed a polygraph examination is a matter of pure speculation. Therefore, defendant has failed to show deficient performance and prejudice.